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IN THE SUPREME COURT OF FLORIDA

NO. _____

RODERICK MICHAEL ORME,

Petitioner,

v.

MICHAEL D. CREWS,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, which demonstrate Mr. Orme was deprived of his right to a fair, reliable, and individualized sentencing proceeding in violation of fundamental constitutional imperatives.

The following abbreviations will be utilized to cite to the record in this appeal, with appropriate page number(s) following the abbreviation:

"R." – record on direct appeal to this Court;

"PCR." - record on postconviction appeal to this Court;

"R2." – record on direct appeal from the resentencing;

"RT." - transcript of resentencing;

"PC-R2." - record on resentencing postconviction appeal.

All other references will be self-explanatory or explained herein.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Orme respectfully requests oral argument.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const. The petition presents issues which

directly concern the constitutionality of Mr. Orme's sentence of death.

Jurisdiction in this action lies in the Court, see e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital resentencing in which this Court heard and denied Mr. Orme's direct appeal. See Wilson v. Wainwright, 474 So. 2d 1162, 1163 (1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those pled herein, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Orme asserts that his sentence of death was obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. ORME'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS FORCED, WITHOUT ANY JUSTIFICATION OR CONCERN SPECIFIC TO HIM, TO WEAR A STUN BELT DURING THE RESENTENCING PROCEEDINGS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Shackling a defendant during a criminal trial is "inherently prejudicial." Deck v. Missouri, 544 U.S. 622, 635 (2005) (quoting Holbrook v. Flynn, 475 U.S. 560, 568 (1986)). See also Bryant v. State, 785 So. 2d 422, 429 (Fla.2001) (quoting Bello v. State, 547 So. 2d 914, 918 (Fla.1989)). In Deck, 544 U.S. at 632, the United States Supreme Court explained that "the considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases." The Court stated:

> Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the "'severity'" and "'finality'" of the sanction, is no less important than the decision about guilt. *Monge* v. *California,* 524 U.S. 721, 732 (1998) (quoting *Gardner* v. *Florida,* 430 U.S. 349, 357 (1977)).
>
> Neither is accuracy in making that decision any less critical. The Court has stressed the "acute need" for reliable decisionmaking when the death penalty is at issue. *Monge, supra,* at 732 (citing *Lockett* v. *Ohio,* 438 U.S. 586, 604 (1978)(plurality opinion)). The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community — often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. Cf. Brief for Respondent 25-27. It also almost inevitably affects adversely the jury's perception of the character of the defendant. See *Zant* v. *Stephens,* 462 U.S. 862, 900 (1983) (REHNQUIST, J., concurring in judgment) (character and propensities of the defendant are part of a "unique, individualized judgment regarding the

> punishment that a particular person deserves"). And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations — considerations that are often unquantifiable and elusive — when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale." *Sochor* v. *Florida,* 504 U.S. 527, 532 (1992) (internal quotation marks omitted); see also *Riggins,* 504 U.S., at 142 (KENNEDY, J., concurring in judgment) (through control of a defendant's appearance, the State can exert a "powerful influence on the outcome of the trial").

Id. at 632-33. While the Supreme Court proceeded to state that the right to be free of physical restraints is not absolute, it explained that any determination in favor of shackling must be case specific and based on a particular concern related to the defendant on trial:

> It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.

Id.

In Mr. Orme's case, the issue concerned a stun belt as opposed to shackles. However, as this Court observed in Weaver v. State, 894 So. 2d 178, 193 (Fla. 2004), the legal analysis as to the necessity of such restraints remains the same:

> A trial court's decision to allow the use of a stun belt is governed by the same legal principles developed in our earlier cases regarding the use of physical restraints at trial, primarily the use of shackles. *See, e.g., Bryant v. State,* 785 So.2d 422, 428 (Fla. 2001) (involving use of leg and waist restraints). As a general rule, a defendant has the right to appear before the jury free from physical restraints. *See Illinois v. Allen,* 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (mentioning this principle in relation to shackles). However, a criminal defendant's

> right to be free of physical restraints is not absolute. *See Bryant*, 785 So.2d at 428; *United States v. Mayes*, 158 F.3d 1215, 1225 (11th Cir. 1998) (quoting *United States v. Theriault*, 531 F.2d 281, 284 (5th Cir. 1976)). Restraints "may be necessary to prevent the defendant from disrupting the trial . . . and to protect the physical well-being of the jury, lawyers, judge, and other trial participants." *Israel v. State*, 837 So.2d 381, 390 (Fla. 2002) (quoting *Zygadlo v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir. 1983)). The use of restraints is within the sound discretion of the trial court. *See Elledge v. State*, 408 So.2d 1021, 1023 (Fla. 1981).

Similarly, in United States v. Durham, 287 F.3d 1297, 1306 (2002), the Eleventh Circuit Court of Appeals stated that "a decision to use a stun belt must be subjected to at least the same 'close judicial scrutiny' required for the imposition of other physical restraints." The Eleventh Circuit elaborated:

> [S]tun belts plainly pose many of the same constitutional concerns as do other physical restraints, though in somewhat different ways. Stun belts are less visible than many other restraining devices, and may be less likely to interfere with a defendant's entitlement to the presumption of innocence. However, a stun belt imposes a substantial burden on the ability of a defendant to participate in his own defense and confer with his attorney during a trial. If activated, the device poses a serious threat to the dignity and decorum of the courtroom.

Id. at 1306.

In Mr. Orme's case, the trial court asked personnel from the Bay County Sheriff's Office for a recommendation of what type of security they believed would be needed at the resentencing proceedings (R2. 3615). The response was that a stun belt in combination with a Brady brace would be appropriate (R2. 3616). The defense objected to this recommendation on the basis that Mr. Orme had been before the court on numerous occasions in the previous trial, penalty phase as well as the current proceedings,

and there had never been any indication that he presented a security risk (R2. 3616).

The trial court proceeded to hold a hearing as to this issue (R2. 3619). While personnel from the Bay County Sheriff's Office explained how the various devices worked (R2. 3621-24), they acknowledged that there was no concern related specifically to Mr. Orme justifying the necessity of these restraints[1]:

> A. We've been given no information to indicate that he has created any problems or had any assaults on law enforcement. There were a couple of write-ups that he received during his incarceration but, you know, I think there were only a couple in the many years that he had been incarcerated. So he does not appear to have given any disciplinary or violent type tendencies while he's been incarcerated.

(R2. 3625).

* * * *

> Q. You have not been provided any information from DOC or from anybody in your local jail or any other facility that's housed Mr. Orme that has indicated to you that he has in the past been a threat for violence or a threat to the police, have you?
>
> A. That's correct, no we have not.

(R2. 3653).

* * * *

> Q. **Your entire position on the security measures in this case is based on generalities not specific to Mr. Orme other than - -**
>
> A. **Correct, yes.**
>
> Q. - - the fact of what he's charged with, correct?
>
> A. **Yes, this has nothing to do with Mr. Orme, this has to do with all the criteria that surrounds him.**

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[1]Rather, the recommendations had to do with the fact that the case involved a subject charged with murder (R2. 3621).

(R2. 3637)(emphasis added). Thus, as resentencing counsel argued, "The record is devoid of any evidence that Mr. Orme is some sort of escape risk or threat to anyone in the courtroom." (R2. 3670).[2]

The trial court also acknowledged that Mr. Orme had been before it several times over the last fifteen years and that under strong security, Mr. Orme had not acted out during any of these proceedings (R2. 3675). However, due to Mr. Orme's conviction of first degree murder and the general testimony of security about flight risk and the close proximity of the courtroom for the audience, jurors and court personnel, the trial court determined that there were security issues (R2. 3675-76). However, due to Mr. Orme's history [of not being a flight risk or threat to security], the court determined that both the Brady belt and stun belt were not required (R2. 3676). Finding that the stun belt would be the least restrictive restraint, the court ordered that to be used (R2. 3677).

Mr. Orme submits that the trial court's determination was erroneous and constitutes an abuse of discretion. As the record demonstrates, the security measures were based on generalities not specific to Mr. Orme and had "nothing to do with Mr. Orme." Rather, as the record demonstrates, there was no indication whatsoever that Mr. Orme would act in any way but in a proper manner. Under these circumstances, Mr. Orme's due process and

[2]The defense further noted that Mr. Orme had been through the penalty phase before, and there were no leg braces or black boxes used (R2. 3674).

Sixth Amendment rights were violated as a result of him being forced to wear a stun belt during the resentencing proceedings. Appellate counsel was ineffective for failing to raise this issue on direct appeal. Habeas relief is warranted.

CLAIM II

MR. ORME WAS DENIED THE RIGHT TO DUE PROCESS, EQUAL PROTECTION AND THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE STATE WAS ALLOWED TO BE NOTICED OF AND PARTICIPATE IN PRIVILEGED DISCUSSIONS AND COMMUNICATIONS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT ON APPEAL.

Mr. Orme's defense was hampered by the fact that the State was permitted to be involved in privileged aspects of the defense case. While the defense continually filed ex parte motions concerning matters relating to Mr. Orme's defense, the court continually denied the ex parte portions of the motions. Likewise, the Judicial Administration Commission (JAC), upon whom the defense served the ex parte motions, served the State Attorney with its response to such motions. Thus, the State Attorney was aware of, and allowed to participate in, privileged discussions and communications, much of which concerned work product.

On December 9, 2005, a hearing was held on two Defense motions filed ex parte, one concerning DNA testing and the other for appointment of an expert (R2. 3159). Upon inquiry, the defense explained the reasoning for filing the motions ex parte: "Our concern, Your Honor, is not to give the prosecution, in effect, a spectator seat as to the defense strategy in trying this case." (R2. 3159). Noting that the State didn't have to

first bring such issues to the defense's attention, the defense argued that this presented equal protection and due process problems (R2. 3159-60). The court denied the ex parte portion of the motions on the basis that Florida is an open discovery state, these weren't closed proceedings, and the State had a right to be heard and noticed (R2. 3160, 3162-63).

At a February 23, 2006 hearing on the defense's ex parte motion for additional expert assistance (R2. 3255), the court stated that it didn't understand the ex parte portion of the motion (R2. 3255). According to the court, "I thought we were way past all of that" (R2. 3255). In response, the defense explained:

> MR STONE: Well, you know, to the extent that, as we did last time to the extent that the request for expert assistance to give the prosecution a window into the thinking, if any, of the defense, I think it's, would be a violation of Mr. Orme's right to counsel to conduct the hearing in the full gaze of the prosecution. That's all. I don't have any - -

(R2. 3256). The court denied the ex parte portion of the motion (R2. 3256).

At a May 4, 2006 hearing, in response to a motion the defense had intended to be filed ex parte because it dealt solely with the remuneration of experts, the court stated, "Well, as the court has previously said we're way past all those ex parte stages so there aren't any ex parte motions before the court and the state has a right to be heard." (R2. 3289).

On February 15, 2007, the defense filed a motion for a reduced sentence due to the JAC's disclosure of defense ex parte motions to the State Attorney's office (R2. 2621). The motion

stated that the defense recently served the JAC with a number of ex parte motions regarding the payment and/or appointment of a number of defense experts, and that the motions were not served on the State Attorney's Office in order to protect Mr. Orme's work product information (R2. 2621-22). Yet, according to the defense, the JAC unnecessarily copied the State Attorney's office with its response to the motions (R2. 2622). The defense asserted that this violated Mr. Orme's right to the effective assistance of counsel in that the JAC's disclosure of the existence and content of these ex parte motions prejudiced Mr. Orme by disclosing to the State Attorney information from which "aspects of the defense strategy may be deduced, information it was clearly not entitled to receive." (R2. 2623). The defense further contended that "[t]his Court should not allow the State of Florida to seek this State's harshest punishment when it has failed to provide Mr. Orme with effective assistance of counsel by violating Mr. Orme's attorney work product privilege." (R2. 2623). Thus, according to the defense, "[M]inimum State and Federal due process requirements mandate that the State of Florida be precluded from seeking the death penalty in this case and that this Court sentence Mr. Orme to life in prison." (R2. 2623).

At a hearing on the issue, the trial court stated that it had previously ruled that all motions for expert witnesses were not ex-parte and that the State Attorney's office had a right to be noticed (R2. 3426-27). Additionally, the court stated that the motions are filed in the court file, no records had been

sealed by the court, and the records were open to the public (R2. 3427). The defense took issue with this, arguing that those matters should be sealed. "My time records are in the court file apparently then unsealed. These, we have invoices of our experts attached to these motions. This is nothing but a window into the defense preparation for the State, if these things are - -." (R2. 3426). The court's ruling remained the same and it denied the defense's motion for a directed verdict:

> THE COURT: Okay, well, let's go to, the Court's already ruled, had previously ruled and the Court again rules that these are not ex-parte motions, therefore your motion for directed sentence due to JAC's disclosure of defense ex-parte motions through the State Attorney's Office is denied. We will now let you go to your motion for directed sentence.

(R2. 3431).

Mr. Orme submits that the trial court's determination was erroneous. There was no justification for allowing the State to be involved in matters relating to the defense's preparation of Mr. Orme's case, especially when there was no such requirement on the State. Nor was there any justification for Mr. Orme to be treated differently from capital defendants represented by the public defender's office or by privately retained counsel who are not required to share such information with those prosecuting them. Here, Mr. Orme was denied his right to due process, equal protection and the effective assistance of counsel. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of

Cleburne, Texas, et al.v. Cleburne Living Center, Inc., et al., 473 U.S. 432, 439 (1985), citing to Plyler v. Doe, 457 U.S. 202, 216 (1982). The Due Process Clause of the Fourteenth Amendment has long been recognized as assuring "fundamental fairness" in state criminal proceedings. See, e.g., Lisenba v. California, 314 U.S. 219, 236 (1941); Moore v. Dempsey, 261 U.S. 86 90-91 (1923); Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990)("In this respect the term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals.").

Here, as a result of the State's actions, Mr. Orme was deprived of a level playing field. See Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994)("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved."). Mr. Orme submits that appellate counsel was ineffective for failing to raise this issue on direct appeal. Habeas relief is warranted.

CLAIM III

MR. ORME WAS DENIED A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PROSECUTOR'S ARGUMENT AT THE RESENTENCING PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WAS INFLAMMATORY AND IMPROPER. APPELLATE COUNSEL'S FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE.

This Court has held that when improper conduct by a prosecutor "permeates" a case, relief is proper. Ruiz v. State, 743 So. 2d 1 (Fla. 1999); Garcia v. State, 622 So. 2d 1324 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). The

State's presentation of improper, inflammatory argument denied Mr. Orme his fundamental right to a fair resentencing proceeding. Appellate counsel's failure to raise this issue on direct appeal prejudiced Mr. Orme.

During closing argument, the State urged the jurors to sentence Mr. Orme to death on the basis of numerous impermissible and improper factors. Specifically, the prosecutor attempted to paint a horrifying image of the victim's last moment based on facts not in evidence. Moreover, the prosecutor also violated the Golden Rule by asking the jury to place themselves in the victim's shoes:

> Josh Lee, what did we learn from Josh Lee? Sound proof rooms, **no one, no one, but this Defendant heard the screams of Lisa in the last minute of her life**. A sound he will hear but no one else will hear for the rest of their life.

(RT. 1177)(emphasis added).

* * * *

> I submit she was not unconscious, **she was awake every second**, knowing there were things she would never say to her son, knowing that death was imminent. She truly had her head in the hands of a lion, a lion that showed no mercy as he savaged her a lion built, forceful, unrelenting and merciless.

(RT. 1184)(emphasis added).

* * * *

> At 10 seconds Lisa Redd is looking up close and personal into the eyes {sic} into eyes of this man she trusted, this man at one time she had had affectionate feelings for, this man who she only came to help, and for 10 seconds with her very life passing before her eyes: (hitting desk) bam, bam, bam, bam, bam, bam, bam, bam, bam, bam, bam, bam, bam, **she could not scream, she could not breathe, she could not cry, she could not beg, she could not offer please take my car, go ahead, take the purse, you've already beaten me, you have already raped me, I have no dignity, don't take my life, and she looked and he looked back and he made a**

> **decision, a decision that he would not stop, he would not stop but he would continue after her body went limp.** Two minutes, he could have let go. How long did he have to hold it. Four minutes or longer, that's assuming he never let up, that's assuming he never relented, that's assuming he had complte occlusion, complete occlusion. As he looked down into her lifeless, limp body, he could have shown mercy. She's unconscious now, I can walk out with the purse, I can drive off with the car, I don't have to keep holding on, I don't have to rob her son of his mother, I can let her live. I can choose life over a brutal death.
>
> **When you go back to deliberate, I pray each of you take some time to think how long four minutes is. Everybody has watches, take some time to really, really think and nobody say a word, sit around that table and nobody say a word for four minutes, think about the choices that he made. Was she feeling and endorphins, was she feeling a sense of calm, or was she feeling deep sadness, fear, pain, cruelty, what does our common sense tell us?**

(RT. 1187-88)(emphasis added).

* * * *

> **Do you think when Lisa Redd got that blow to the kidney that she was not begging him to stop.** Feeling the pain that she felt as her kidney is hemorrhaging, **she didn't beg him, please, Mike, let me go, you are hurting me.**

(RT. 1211)(emphasis added). Arguments that invite the jury to put themselves in the victim's place are generally characterized as "Golden Rule" arguments and are improper. According to this Court, "the prohibition of such remarks has long been the law of Florida." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), citing Barnes v. State, 58 So. 2d 157 (Fla. 1951). A prosecutor is prohibited from inviting the jurors to imagine the victim's final pain. Bertolotti, 476 So. 2d at 133. Here, the prosecutor not only invited the jury to imagine the victim's final moments, he also instructed them to imagine them during deliberations. In Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998), this Court

condemned such arguments:

> We also note that the prosecutor, as in Garron, went far beyond the evidence in emotionally creating an imaginary script demonstrating that the victim was shot "while pleading for his life." We find that, as in Garron, the prosecutor's comment constitutes a subtle "golden rule" argument, a type of emotional appeal we have long held impermissible. By literally putting his own imaginary words in the victim's mouth, i.e., "Don't hurt me. Take my money, take my jewelry. Don't hurt me," the prosecutor was apparently trying to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused." Barnes v. State, 58 So. 2d 157, 159 (Fla. 1951); see Garron, 528 So. 2d at 359 nn. 6, 8 & 9; Bertolotti, 476 So. 2d at 133.

In addition, the prosecutor urged a sentence of death based on the notion that Mr. Orme is inherently evil:

> We are all into labels, aren't we, we have got all these labels for everything, you know, substance abuse, poly-substance abuse, depressive something or another, can't you just sometimes be a crack head, can you just sometimes be a pot head, is it possible and reasonable that normal people go out and decide to become addicts and they take drugs, not intentionally become an addict, but they go out and make the decision to take drugs and they become addicts. **But there are also some people who are evil that do that, and just because they take drugs does not change them.** But now with, gosh, I don't know how many psychologists and psychiatrists we have seen, over a dozen, I think, over the last 15 years, now we come up with all these labels to try to, to try to put some scientific explanation on behavior. **Can it just be that sometimes people are evil, cruel, indifferent to the suffering of others that there's no little fancy label for?** Maybe, just maybe it does a disservice to those people who really are ill when we try to justify or minimize the cruel actions of one individual by trying to say, well, it's because of his illness.

(RT. 1190-91)(emphasis added).

"When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of

proper argument." Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). Here, the cumulative effect of the State's closing argument was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant, as they did here, when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also, United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). Here, the prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989). He intended that Mr. Orme's jury consider factors outside the scope of the evidence.

The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So. 2d 611, 614 (Fla. 3rd DCA 1987). This Court has called such improper prosecutorial commentary "troublesome." Bertolotti, 476 So. 2d at 132.

Arguments such as those made by the prosecutor at Mr. Orme's resentencing violate due process and the Eighth Amendment, and render his death sentence fundamentally unfair and unreliable. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985) (en banc); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson

v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). Here, as in Potts, because of the improprieties evidenced by the prosecutor's argument, the jury "failed to give [its] decision the independent and unprejudicial consideration the law requires." 734 F.2d at 536. In the instant case, as in Wilson, the State's closing argument "tend[ed] to mislead the jury about the proper scope of its deliberations." 777 F.2d at 626. In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." Id. at 627. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id.

While singular incidents of impropriety may sometimes not result in a denial of due process, when, as in Mr. Orme's case a certain critical mass of misconduct is reached, due process is thwarted. The prosecutor's numerous improper and inflammatory arguments fatally infected Mr. Orme's sentencing phase and rendered his death sentence unreliable. Appellate counsel's failure to raise this issue on direct appeal prejudiced Mr. Orme. Strickland. Habeas relief is warranted.

CONCLUSION

For all the reasons discussed herein, Mr. Orme respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by electronic service to Carolyn Snurkowski, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 8th day of January, 2014.

/s/ Linda McDermott
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CERTIFICATION OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

/s/ Linda McDermott
LINDA M. MCDERMOTT